85-1340

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES W. MARCUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The question raised in this appeal is:

POINT I

WHETHER THE PETITIONER WHO ESCAPED FROM STATE CUSTODY WHILE FEDERAL HABEAS CORPUS APPEAL WAS PENDING IS ENTITLED TO REINSTATEMENT OF THE APPEAL AFTER RECAPTURED UNDER DUE PROCESS CLAUSE OF FIFTH AND FOURTEENTH AMENDMENTS?

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IN THE

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OCTOBER TERM, 1985

No.

CHARLES W. MARCUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, CHARLES W. MARCUM, prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals, Eleventh Circuit, entered in the above-captioned case on November 13th, A.D., 1985, with Motion for Reconsideration denied December 26th, A.D., 1985. A three judge Circuit panel of the Eleventh Circuit Court of Appeals entered its Order denying the Petitioner's Motion to Reinstate his appeal on November 13th, A.D., 1985, and upon a Motion for Reconsideration, denied the same on December 26th, 1985. Said Orders are printed herewith at pages 1a & 2a, appendixes A & B.

OPINION BELOW

The Petitioner was before the United States Court of Appeals for the Eleventh Circuit on appeal from an Order denying the Petitioner's Petition for a Writ of

Habeas Corpus. A copy of the Order entered by a judge of the Federal District Court, Northern District, Tallahassee, Florida, on the 30th day of June, A.D., 1981, is printed herewith at pages 3a & 4a, appendix C.

The case had been set for oral argument by the appellate court on the 6th day of December, A.D., 1982.

The Petitioner escaped from state custody on the 26th day of August, A.D., 1982, which resulted in the appeal being conditionally dismissed by the Eleventh Circuit Court of Appeals, subject to the Petitioner returning to custody within 10 days from the Order. See pages 5a & 6a, appendix D.

The Petitioner was returned to custody, after capture, on the 29th day of May, A.D., 1985.

The Petitioner filed his Motion and Memorandum of Law to Reinstate his appeal on the 4th day of October, A.D. 1985. See pages 7a-17a, appendixes E & F.

The appellate court on November 13th, A.D., 1985, denied, without opinion, the Petitioner's Motion to Reinstate and further denied, without opinion, the Petitioner's Motion for Reconsideration, which latter ruling was on December 26th, A.D., 1985. See pages 1a & 2a, appendixes A & B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

THE UNITED STATES CONSTITUTION, AMENDMENTS FIVE AND FOURTEEN. (DUE PROCESS). ARTICLE 1, SECTION 9, CLAUSE 2, UNITED STATES CONSTITUTION AS EXTENDED BY 28 U.S.C. § 2241 (c)(3) AND 2254(a).

STATEMENT

On October 7th, 1976, the Petitioner was convicted in Florida State court of first degree murder; burglary of a residence; conspiracy to commit burglary or a kidnapping; murder or robbery; attempted murder; and two counts of aggravated assault. Petitioner was originally sentenced by a Circuit Court Judge in Volusia County, Florida, to two life terms of imprisonment, plus 55 years, to be served consecutively.

On appeal, the Fifth District Court of Appeal of Florida reversed the conviction as to the charge of first degree murder and reduced it to second degree murder. The court affirmed the conviction on all other counts. See *Marcum v. State*, 379 So.2d 974 (Fla. 5th DCA 1979), cert. denied, 389 So.2d 1112 (Fla. 1983).

On October 8th, 1980, Petitioner filed his Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida.

On February 19th, 1981, the United States magistrate for the Northern District of the State of Florida, Tallahassee Division, issued a report and recommendation that the Petitioner's Petition for Writ of Habeas Corpus be denied on the merits and judgment entered.

On June 30th, 1981, the United States District Court for the Northern District of Florida adopted the report and recommendation and denied Petitioner Habeas Corpus relief.

That on August 31st, 1981, the District Court for the Northern District of Florida denied the request by Petitioner for a Certificate of Probable Cause to appeal. See page 18a, appendix G.

On Jan. 10th, 1982, the United States Court of Appeals for the Eleventh Circuit granted Petitioner's application for Certificate of Probable Cause. See page 19a, appendix H.

Petitioner escaped from custody of the Florida Department of Corrections on August 26th, 1982.

On October 22nd, 1982, counsel for the Petitioner was notified that oral argument was tentatively scheduled for the week of December 6th, 1982.

On December 7th, 1982, the United States Court of Appeals for the Eleventh Circuit conditionally dismissed the appeal on Petitioner's Petition for Writ of Habeas Corpus and conditioned upon the Petitioner returning to custody within 10 days.

On January 4th, 1983, the Petitioner, having failed to return to custody, the mandate was issued, at which time the dismissal became final.

On May 29th, 1985, Petitioner was again placed in custody of government officials.

On October 4th, 1985, the Petitioner filed his Motion to Reinstate his appeal with the Eleventh Circuit Court of Appeals in Atlanta. On November 13th, 1985, the Court, without opinion, denied Petitioner's Motion to Reinstate and on December 26th, 1985, denied Petitioner's Motion for Rehearing.

SUMMARY OF ARGUMENT

Petitioner contends that reinstatement at the appellate level of his post-conviction collateral attack of his state conviction through federal habeas corpus is appropriate and necessary so that the constitutional issues presented by the Petitioner may be speedily and economically resolved. The historical role of the Writ of Habeas Corpus as an effective and imperative remedy for detention contrary to fundamental law and due process compels reinstatement rather than reapplication of the Writ.

ARGUMENT

The failure of the appellate court to reinstate an escaped state prisoner's appeal after recapture renders ineffective the imperative historical role of the Writ and denies the Petitioner due process under the Fifth and Fourteenth Amendments to the Constitution. The Petitioner argues that the unadjudicated merits of Petitioner's appeal pending at the time of escape are constitutionally best presented and preserved by reinstatement of the appeal rather than requiring the Petitioner to refile his Petition for Writ of Habeas Corpus.

Traditionally, the availability of the remedy through habeas corpus in collateral attacks upon post-conviction state cases depended solely on the in-custody status of the Petitioner and successive applications for the Writ were allowed as long as confinement continued. See *Sanders v. United States*, Section 37, 373 U.S. 1, 10 L.Ed.2d 148 (1963); *Faye v. Noia*, 372 U.S. 391, 9 L.Ed.2d 837; and, *Williams v. Holbrook*, 691 F.2d 3 (1982) (1st Circuit).

Petitioner contends that a Motion to Reinstate a dismissed appeal is, in legal effect, a reapplication, especially where, as here, the appellate court has issued its Certificate of Probable Cause.

The Petitioner contends that the per se procedural rule of dismissal of an escaped state prisoner's federal habeas corpus appeal does not disentitle the Petitioner, upon recapture, to call upon the resources of the court for determination of his claims at the appellate level or for reentry at the federal appellate level.

The Writ of Habeas Corpus should not rest upon the discretion of the court, but should find its force and vitality in the historical scope of its purpose. The Writ is not automatically subject to all rules governing ordinary civil actions. See *Schlanger v. Seamans*, 91 S.Ct. 995, 28 L.Ed.2d 251; and, *Smith v. Bennett*, 81 S.Ct. 89, 6 L.Ed.2d 39. The application of a per se dismissal rule

of an escape state prisoner, who, after recapture, is seeking appellate relief through reinstatement of his dismissed habeas corpus appeal does harm to the doctrine of federal relief from constitutionally defective state convictions through habeas corpus in the following respects, to-wit:

1. The rights, ripe for adjudication, remain unadjudicated; and, therefore suspended.
2. The judicial resources of the court are duplicated.
3. The petitioner is punished twice for his escaped conduct.
4. The immediate hearing requirement of the Writ is delayed by procedural rule.

Essentially, the Writ is in aid of right and liberty. *Estrada v. Ahrens*, C.A. Fla. 296 F.2d 690. If, as it has been stated, the Writ is secured by the Fourteenth Amendment to Federal Constitution, any procedural rule which substantially impairs the efficacy of the Writ should be unconstitutional. The efficacy of the Writ contemplates the ultimate speedy disposition of the constitutional issues raised; not the recalcitrant conduct of the Petitioner who escapes from custody. The procedural rule of dismissal, in effect, suspends the Writ where no such suspension is provided under the Constitution in that it prevents further proceeding on the appeal after recapture. After the reason for the suspension of the Writ has passed, the privilege of the Writ cannot remain suspended. See *In Re: Spurlock*, 66 F. Supp. 997. The immediate hearing requirement of the Writ (See *Walker v. Wainwright*, 88 S.Ct. 962, 19 L.Ed.2d 1215; *Parker v. Ellis*, 80 S.Ct. 909, 4 L.Ed.2d 963; *Price v. Johnson*, 68 S.Ct. 1049, 92 L.Ed. 2d 1356) overrides per se procedural rule effecting only the resources of the court. The courts cannot risk extinguishment of any man's constitutional right, though his conduct may not be conducive to the confidence in his claims. See *Newton v. Cupp*, 474 P.2d 532. In habeas corpus proceedings courts have an obligation to exercise zeal in procedural protection of legal and constitutional

rights, particularly those involving human freedom (*Worbetz v. Goodman*, 136 A.2d 1); especially where substantial rights are claimed to have been violated in state trial proceedings effecting due process and the federal appellate court has issued its Certificate of Probable Cause, the diligence of the court in finding ways to protect it should be exercised. *United States, ex rel. Quinn v. Jackson*, 168 F.2d 840.

CONCLUSION

Due process, under the Fifth and Fourteenth Amendments to the Constitution, as well as the historical role of federal habeas corpus to redress claimed state conviction due process denials, mandates reinstatement of federal appeal, especially where probable cause has been certified by the appellate court.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5062

CHARLES W. MARCUM, # 055945,
Petitioner,

versus

LOUIE L. WAINWRIGHT, *et al.*,
Respondents.

Appeal from the UnitedStates District Court
for the Northern District of Florida

[Filed Nov. 13, 1985]

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

The petitioner's motion to reinstate the above referenced appeal is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5062

CHARLES W. MARCUM, # 055945,
Petitioner,

versus

LOUIE L. WAINWRIGHT, *et al.*,
Respondents.

Appeal from the United States District Court
for the Northern District of Florida

[Filed Dec. 26, 1985]

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

Appellant's petition for rehearing, treated as a motion for reconsideration of the order of November 13, 1985, is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 80-1037

CHARLES W. MARCUM,
Petitioner,

v.

LOUIE L. WAINWRIGHT, *et al.*,
Respondents.

[Filed July 2, 1981]

ORDER

Before the court are the magistrate's report and recommendation (Document 14), and petitioner's objections thereto (Documents 15 and 16). Upon consideration thereof, it is

ORDERED:

1. The magistrate's report and recommendation is adopted and incorporated by reference in this order of the court.

2. The clerk is directed to prepare, sign and enter a judgment in accordance with Rule 58(1), F.R.Civ.P., that the petitioner take nothing, and that this action be denied on the merits.

DONE AND ORDERED this 30th day of June, 1981.

/s/ William Stafford
WILLIAM STAFFORD
Chief Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5062

CHARLES W. MARCUM,
Appellant

versus

LOUIE L. WAINWRIGHT, *et al.*,
Appellee

Appeal from the United States District Court
for the Northern District of Florida

[Filed Dec. 7, 1982]

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge, and MORGAN, Senior Circuit Judge.

BY THE COURT:

This case is set for oral argument on Thursday, Decembmer 9, 1982. Counsel for appellant has notified the court that appellant escaped from custody.

The appeal is CONDITIONALLY DISMISSED, subject to more formal determination of appellant's escape status. Counsel for appellant shall notify the court in a more

formal manner within ten (10) days of appellant's present status. If appellant is in escape status this dismissal shall become final. If the report of his escape is erroneous the conditional dismissal shall be vacated.

See: *Quarles v. Alabama*, 578 F.2d 1148, 1149 (5th Cir. 1978); *Taylor v. Egeler*, 575 F.2d 773 (6th Cir. 1978); and *Lopez v. Malley*, 552 F.2d 682, 683 (10th Cir. 1977).

Issued as Mandate: January 4, 1983

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 82-5062

CHARLES W. MARCUM,
Appellant,

vs.

LOUIE L. WAINWRIGHT, ETC., *et al.*,
Appellees.

MOTION TO REINSTATE APPEAL OF PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Appellant, CHARLES M. MARCUM, by and through his undersigned attorney, and respectfully moves this Court to reinstate the appeal of his Petition for Writ of Habeas Corpus previously dismissed and would show unto this court the following:

1. That on October 7, 1976, the Appellant was convicted of First Degree Murder of an alleged co-felon; burglary of a residence; conspiracy to commit the burglary or kidnapping, murder or robbery; and attempted murder; two counts of aggravated assault. The Appellant was sentenced to two life terms of imprisonment, plus 55 years, to be served consecutively.

2. That on appeal, the Fifth District Court of Appeal of the State of Florida reversed the conviction as it pertained to the charge of First Degree Murder and reduced it to Second Degree Murder. The court affirmed the conviction on all other counts.

Marcum vs. State, 379 So.2d 974 (Fla. 5th DCA 1979), cert. denied, 389 So.2d 1112 (Fla. 1980). On

resentencing for the now-reduced charge of Second Degree Murder, Appellant received one life term of imprisonment, in addition to his previous sentences.

3. That on October 8, 1980, Appellant filed his Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida in accordance with 28 U.S.C. § 2254. The Petition alleged five grounds for Habeas Corpus relief. The Respondent in its answer brief, raised four additional grounds on which Habeas Corpus relief could be granted, to which Appellant responded in his reply brief.

4. That on February 20, 1981, the United States District Court for the Northern District of Florida denied Appellant's Motion for Appointment of Counsel.

5. That on December 10, 1980, The Honorable Robert Crougeyer denied Respondent's Motion to Dismiss, on grounds that the Appellant had exhausted all state remedies prior to Appellant's application for Writ of Habeas Corpus.

6. That on February 19, 1981, The Honorable Robert Crougeyer, United States Magistrate for the Northern District of the State of Florida issued a report and recommendation that the Appellant's Petition for Writ of Habeas Corpus be denied on the merits and judgment entered.

7. That on June 30, 1981, the United States District Court for the Northern District of Florida adopted the report and recommendation and denied Appellant Habeas Corpus relief.

8. That on July 29, 1981, the United States District Court for the Northern District of Florida recorded the filing of Appellant's Notice of Appeal and Request for Certificate of Probable Cause to Appeal.

9. That on August 31, 1981, the United States District Court for the Northern District of Florida denied

the request by Appellant for a certificate of probable cause to appeal.

10. That on June 10, 1982, the United States Court of Appeal for the Eleventh Circuit granted Appellant's application for a certificate of probable cause.

11. That on April 22, 1982, the United States Court of Appeal for the Eleventh Circuit granted Appellant's request of appointment of counsel.

12. That Appellant escaped from custody of the Florida Department of Corrections on August 26, 1982.

13. That on October 22, 1982, counsel for the Appellant was notified that oral argument was tentatively scheduled for the week of December 6, 1982;

14. That on December 7, 1982, the United States Court of Appeal for the Eleventh Circuit conditionally dismissed the appeal of Appellant's Petition for Writ of Habeas Corpus, set for oral argument on December 9, 1982.

15. That on January 4, 1983, mandate was issued, at which time the dismissal became final.[1]

16. That on May 29th, 1985, Appellant was again placed in the custody of government officials.

17. That a memorandum brief in support of this Motion is attached hereto, pursuant to Rule 27(a), Federal Rules of Appellate Procedure.

WHEREFORE, for reasons of judicial economy and the ultimate speedy resolution of the constitutional issues raised by Appellant in his Petition for Writ of Habeas Corpus, the Appellant respectfully requests that the matter be reinstated and rescheduled for oral argument.

---

[1] That such dismissal was without prejudice and did not constitute a decision on the merit. *Johnson vs. Lumpkin*, 769 F.2d 630.

DATED this 4th day of October, A.D., 1985.

JUDGE & WARREN, P.A.

/s/ Dan R. Warren
DAN R. WARREN, ESQUIRE
Attorney for Appellant
P.O. Box 5355
Daytona Beach, Florida 32018
(904) 255-3658

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by Hand Delivery to: THE HONORABLE SPENCER D. MERCER, Clerk, United States Court of Appeal, Eleventh Circuit, 50 Spring Street, S.W., Atlanta, Georgia; and a copy hereof by Mail to: WALLACE E. ALLBRITTON, ESQUIRE, Assistant Attorney General, The Capitol, Tallahassee, Florida 32302, this 4th day of October, A.D., 1985.

/s/ Dan R. Wallace
Attorney At Law

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 82-5062

CHARLES W. MARCUM,
Appellant,

vs.

LOUIE L. WAINWRIGHT, ETC., *et al.*,
Appellees.

WHETHER REINSTATEMENT IS APPROPRIATE IN DISMISSED HABEAS CORPUS PROCEEDINGS

ARGUMENT

Appellant respectfully argues that reinstatement of his dismissed Habeas Corpus proceeding is appropriate for reasons of judicial economy and the speedy resolution of the issues presented.

On January 4, 1983, Appellant's appeal of his Petition for Writ of Habeas Corpus was dismissed due to the fact that Appellant had, on August 26, 1982, escaped from the custody of Florida prison officials. On May 29, 1985, Appellant was again placed in custody by Georgia prison officials. Thus, Appellant seeks reinstatement of the dismissed appeal.

The availability of the extraordinary Writ of Habeas Corpus, constitutionally established in Article 1, Section 9, Clause 2 of the Constitution of the United States, traditionally depended upon the in-custody or "detention simpliciter" status of the petitioner. *Fay vs. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 836, 864 (1963). Thus, it has been held that successive applications for the writ

are permissible as long as confinement continues because "[h]abeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." *Fay vs. Noia*, at 9 L.Ed.2d 864-865.

The traditional availability of the writ under Article 1, Section 9, Clause 2, has been expanded, by way of 28 U.S.C. § 2241(c)(3) and § 2254(a), to apply to "prisoners in state custody in violation of the Constitution or laws or treaties of the United States." *Williams vs. Holbrook*, 69 F.2d 3, 11 (1st Cir. 1982). However, and more importantly, statutory and legal authority have imposed limits upon such a prisoner's ability to seek successive applications for the writ. More specifically, 28 U.S.C. § 2244(b) and Rule 9(b) of the Rule Governing Section 2254 cases, 28 U.S.C. following § 2254, grant to federal courts the discretion to decline to consider a second or other successive application for such a writ. But, 28 U.S.C. § 2244 limits the use of this discretionary authority to those instances in which a petitioner has submitted "claims submitted in a prior application which have decided on the merits." *Williams vs. Holbrook*, at 691 F.2d 11. Concerning the case law written on the subject of successive applications by state prisoners for Writ of Habeas Corpus, the Supreme Court, in *Sanders vs. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), wrote that a court may dismiss a second or other successive application for the writ if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders vs. United States*, at 10 L.Ed.2d 161. The *Sanders* standard has since been deemed broader than that established by 28 U.S.C. § 2241(c)(3) and § 2254(a), in that the *Sanders* court has been held to have created the judicial

discretion needed to dismiss an application where the applicant has abused the writ process. *Williams vs. Holbrook*, at 691 F.2d 12. However, the *Sanders* court specifically noted that this discretionary authority is to be "narrowly circumscribed, in conformity with the historical role of the Writ of Habeas Corpus as an effective and imperative remedy for detention contrary to fundamental law." *Sanders vs. United States*, at 10 L.Ed.2d 162-163 (quoting from *Fay vs. Noia*, at 9 L.Ed.2d 689).

Although much case law exists concerning abuse of the writ process sufficient to justify the exercise of the discretionary authority to refuse to hear a Petition for Writ of Habeas Corpus, few courts have rules on the issue of abuse of the writ process where, as in the instant case, a prisoner has escaped from the custody of prison officials while his Petition for Writ of Habeas Corpus was pending, which petition was subsequently dismissed due to the escape of the petitioner, *Williams vs. Holbrook*, *supra*, is one such case.

In *Holbrook*, the petitioner was originally convicted on a charge of First Degree Murder, which conviction was reversed and replaced with a conviction of Second Degree Murder on appeal. Her state court remedies having been exhausted, petitioner filed a Petition for Writ of Habeas Corpus and requested appointment of counsel at the district court level on April 13, 1978. Approximately seven months later, the district court granted her request for appointment of counsel and issued an order to show cause why the writ should not be granted to the respondents. The petitioner, however, had escaped the previous day. Approximately two months later, petitioner filed a second Petition for Writ of Habeas Corpus. The district court dismissed the petition, holding that the escape while her original petition was pending constituted abuse of the writ process. The First Circuit Court of Appeal reversed, finding that because (1) the petitioner faced life imprisonment, (2) the petitioner had raised serious allega-

tions of violations of her constitutional rights, (3) the petitioner had fled the custody of her jailers before the district court had acted on her petition, and (4) the petitioner had been returned to custody, so that she could not "opt in" on the decision of the court if the outcome was favorable to her, the petitioner should be allowed her day in court. *Williams vs. Holbrook*, at 691 F.2d 15.

The *Holbrook* court did take notice of those cases which stand for the proposition that when a state prisoner escapes while his appeal is pending, that person forfeits his right to appeal. It recognized that because such forfeitures preclude the possibility of exhausting state court appellate remedies, the escapee forfeits his ability to seek habeas relief, as well. In effect, such decisions report, escaped prisoners become "disentitled" when they escape, in that they may not call upon the resources of a court for determination of their claims. *Williams vs. Holbrook*, at 69 F.2d. 13. In light of these decisions, however, the *Holbrook* court distinguished the matter before it by recognizing that the other cases involved only direct appeals of the state court convictions, which involved "no federal constitutional right to state appellate review of state criminal convictions," *Williams vs. Holbrook*, at 691 F.2d 13 (quoting *Estelle vs. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377, 380 [1975]). In contrast, the case before the *Holbrook* court involved constitutional rights, because the writ sought was the subject of a federal statute. *Williams vs. Holbrook*, at 691 F.2d 13. This distinction, the *Holbrook* court wrote, existed because:

> "Under governing state statutes, a criminal defendant is entitled to only one appeal, which may be lost absolutely even for failure to comply with procedural requirement. There is no right to reinstatement of an appeal even where a right of appeal has been granted . . . . The right of continued access to the writ remedy, on the other hand, is inherent in the

> remedy and is available only for the gravest of injuries, namely loss of life or liberty in violation of fundamental rights. As stated in *Townsend vs. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), 'the whole history of the writ—its unique development—refutes a construction of the federal court's habeas corpus powers that would assimilate their task to that of courts of appellate review. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the federal. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue, and to present evidence, must never be totally foreclosed.' *Townsend vs. Sain*, [at 9 L.Ed. 2d 785]."

In the instant case, Appellant, who had been convicted of First Degree Murder, which conviction had been reduced to Second Degree Murder on appeal, escaped while his appeal of his petition was pending review. Like *Holbrook*, Appellant had exhausted his state appellate remedies. Like *Holbrook*, Appellant faces life imprisonment. Like *Holbrook*, Appellant alleges serious violations of his constitutional rights, which necessitate the availability of the writ.

Unlike *Holbrook*, the Appellant had unsuccessfully petitioned the United States District Court for the Northern District of Florida for issuance of the writ and had appealed that denial to the Eleventh Circuit Court of Appeal. But, as in *Holbrook*, Appellant did not know the status of his appeal; all he knew was that counsel had been appointed to represent his efforts before the court. On the date of escape, Appellant had not been informed

that the cause had been set for oral argument; that did not occur until October 22, 1982, though Appellant was aware that his application for certificate of probable cause to appeal had been granted, on January 10, 1982. Finally, as in *Holbrook*, Appellant is in the custody of prison officials and therefore, is not in a position to "opt in" if the decision of the court is favorable to him.

CONCLUSION

The Appellant respectfully requests that due to the fact that the United States District Court for the Northern District of Florida has ruled on his Petition for Writ of Habeas Corpus and that due to the fact that the Eleventh Circuit Court of Appeal was preparing to hear oral arguments and rule on the appeal of the Petition for Writ of Habeas Corpus at the time of his escape, the reinstatement of the appeal would best serve the needs of both the court and the Appellant, in that the constitutional issues presented by the Appellant may be speedily and economically resolved.

DATED this 4th day of October, A.D., 1985.

JUDGE & WARREN, P. A.

/s/ Dan R. Warren,
DAN R WARREN, ESQUIRE
Attorney for Appellant
Daytona Beach, Florida 32018
(904) 255-3658

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by Hand Delivery this 4th day of October, A.D., 1985, to: THE HONORABLE SPENCER D. MERCER, Clerk, United States Court of Appeal, Eleventh Circuit, 50 Spring Street S.W., Atlanta, Georgia; and a copy hereof by Mail to: WALLACE E. ALLBRITTON, ESQUIRE, Assistant Attorney General, The Capitol, Tallahassee, Florida 32302.

/s/ Dan R. Warren
Attorney At Law

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 80-1037

CHARLES W. MARCUM,
Petitioner,
vs.
LOUIE L. WAINWRIGHT, *et al.*,
Respondents.

[Filed Aug. 31, 1981]

ORDER

Pursuant to Rule 22(b), F.R.A.P., the undersigned finds that a certificate of probable cause should not issue in the above-styled case. The reasons for such finding are that the undersigned does not believe that an appeal in this instance would be meritorious or taken in good faith. The court relies upon the report and recommendation of the United States Magistrate dated February 19, 1981, adopted in full by this court's order of June 30, 1981.

It is now, therefore, ORDERED:

Certificate of probable cause should be, and the same is hereby, denied.

DONE AND ORDERED this 31st day of August, 1981.

/s/ William Stafford
WILLIAM STAFFORD
Chief Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-9649

CHARLES W. MARCUM,
Petitioner,

versus

LOUIE L. WAINWRIGHT, ETC., *et al.*,
Respondents.

[Filed Jan. 10, 1982]

On Application For Certificate of Probable Cause

ORDER:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause is Granted.

/s/ [Illegible]
United States Circuit Judge